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No. - .

In the
Supreme Court of the United States.

OCTOBER TERM, 1981.

CITY OF REVERE,
PETITIONER,

v.

MASSACHUSETTS GENERAL HOSPITAL,
RESPONDENT.

Petition for a Writ of Certiorari to the Supreme Judicial Court for the Commonwealth of Massachusetts.

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Question Presented.

1. Does a municipality have a constitutional duty, arising under the Eighth Amendment, to pay the medical expenses of a felony suspect injured while being apprehended by the police?

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Petition for a Writ of Certiorari to the Supreme Judicial Court for the Commonwealth of Massachusetts.

Introduction.

The City of Revere petitions for a writ of certiorari to review the judgment of the Supreme Judicial Court for the Commonwealth of Massachusetts, entered on April 12, 1982, which declared that the Eighth Amendment to the United States Constitution required the City of Revere to pay the medical expenses of a felony suspect injured while being apprehended by its police force.

Opinion Below.

The opinion of the Supreme Judicial Court, dated April 12, 1982 (Appendix A), is reported at 385 Mass. 772, 434 N.E.2d 185 (1982).

Jurisdiction.

The Supreme Judicial Court issued its opinion on April 12, 1982 and issued its order for judgment to the trial court on the same date (App. 10a). This petition is being filed within ninety days of April 12, 1982. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

Constitutional Provision Involved.

The Eighth Amendment to the United States Constitution provides as follows: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Statement of the Case.

Petitioner ("Revere") seeks review of the decision of the Supreme Judicial Court for the Commonwealth of Massachusetts holding Revere liable for the medical expenses of a felony suspect injured during the course of an arrest effected by its police force. Revere's duty to pay these costs, according to

the Supreme Judicial Court, was not a function of a common law rule or statute. Rather, the Supreme Judicial Court held that the Eighth Amendment to the United States Constitution required that Revere be held liable to respondent Massachusetts General Hospital ("MGH").

The pertinent facts are not in dispute: On September 20, 1978, Revere police officers responded to a reported breaking and entering at a dwelling house in Revere. At the scene, they observed one Patrick M. Kivlin ("Kivlin") with a suitcase and a pillowcase and they sought to detain him. Kivlin attempted to flee and, after repeated warnings, and then a warning shot, a police officer shot him. To secure treatment for Kivlin, Revere police summoned an ambulance. The ambulance service took Kivlin to the emergency room at MGH where he was admitted for treatment of his gunshot wound (See App. 1a-2a).

Kivlin underwent treatment at MGH until September 29, 1978. While Kivlin was still confined in the hospital, Revere police secured a warrant for his arrest. Upon Kivlin's release from MGH, Revere police served the warrant and transported him to the local court for an arraignment. The court granted Kivlin a continuance until December 1, 1978, and released him on personal recognizance. Had Kivlin not been released on personal recognizance or had he been unable to raise bail, he would have been sent to the Charles Street House of Correction in the City of Boston or another similar facility outside Revere. Revere has no house of correction or other jail within its city limits or under its control (See App. 2a).

On October 18, 1978, MGH sent its bill for services rendered in the treatment of Kivlin to the Chief of the Revere Police Department. The Chief immediately responded to MGH with a letter denying any responsibility for the expenses. On October 27, 1978, Kivlin returned to MGH for additional treatment, including surgery. Notwithstanding Revere's

denial of liability, MGH admitted Kivlin as a patient. The treatment of Kivlin continued until November 10, 1978, when he was discharged. The record does not reflect that MGH made any effort to collect its fees from Kivlin. Similarly, there was no indication that Kivlin was indigent or otherwise unable to pay the costs of the medical treatment (see App. 2a-3a).

MGH commenced this action against Revere on January 17, 1979, to recover the cost of the medical services rendered to Kivlin. After completion of the pleadings, MGH moved for summary judgment, Mass. R. Civ. P. 56, 368 Mass. 824 (1974), and the motion was referred to a special master for hearing. After hearing, the special master wrote a report to the trial court, recommending that the trial court enter judgment for Revere since, according to the special master, there was no common law, statutory or constitutional basis for a recovery against Revere. The trial judge, after reviewing the report of the special master and the papers on file in the case, agreed with the conclusions of the special master, entered summary judgment for Revere and dismissed MGH's complaint. After the entry of judgment for Revere, MGH duly filed its appeal to the Appeals Court and after entry of the appeal in the Appeals Court, the Supreme Judicial Court transferred the case to its docket on its own motion (see App. 3a).

The Supreme Judicial Court, after hearing, reversed the judgment of the trial court. Although MGH argued that its right to recover was grounded both on state law and constitutional grounds, the Supreme Judicial Court rejected all state law claims.[1] Instead, it held that the Eighth Amendment

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[1] The court likewise eliminated state constitutional grounds as a basis for the judgment for MGH. Noting that the Massachusetts Constitution, Article 26 of the Declaration of Rights, also contains a prohibition against "cruel and unusual punishments," the court refused to consider the application of this provision since MGH did not raise or argue it (App. 5a, n.6).

mandated that Revere be held liable in damages. As the Court stated, 385 Mass. at 774, 434 N.E.2d at 186, App. 3a:

> While there is no contractual basis for recovery, we hold that the constitutional prohibition against cruel and unusual punishment, embodied in the Eighth Amendment to the United States Constitution, requires that Revere be liable to the hospital for the medical services rendered to Kivlin during his first stay at the hospital . . . .

The Supreme Judicial Court relied on *Estelle* v. *Gamble*, 429 U.S. 97 (1976), as the authority for Revere's liability. According to the Supreme Judicial Court, *Estelle's* prohibition against "deliberate indifference" to the medical needs of prisoners created a legal duty on the part of Revere to supply the suspect with "necessary medical care." (App. 7a-8a.) Since Revere was obliged to provide this care, the Court reasoned it was likewise responsible for paying for the treatment rendered.

Revere's contention that *Estelle* was limited to prisoners in a jail facility was flatly rejected by the Supreme Judicial Court. As the court stated, 385 Mass. at 777, 434 N.E.2d at 188, App. 6a, "It is not the fact of incarceration, however, that triggers the protections afforded by the Eighth Amendment. Rather, it is the suspect's loss of freedom when he "cannot by reason of the deprivation of his liberty, care for himself . . . that requires the government to begin to provide medical care." (Citations omitted.) Whether such a constitutional duty exists on the part of a municipality, to fund the costs of this emergency medical treatment, is the issue raised by the Supreme Judicial Court's opinion and is the issue presented to this court by this petition.

Reasons for Granting the Writ.

It is neither unprecedented nor improbable that a criminal suspect such as Kivlin would be injured during the course of an arrest, would require emergency medical treatment from a hospital, and, as a result, would incur medical expenses for which the hospital would seek payment. The Supreme Judicial Court's response to this scenario, however, in holding the municipality liable under the Eighth Amendment for these expenses merely because the injury occurred incident to the proper discharge of duty by its police officers, is extraordinary. In finding the Eighth Amendment to be the basis of this liability, the Supreme Judicial Court ignored important principles enunciated in prior decisions of this court, contradicted opinions from other state supreme courts, and engaged in social engineering that grossly distorts the meaning and purpose of the Eighth Amendment. If permitted to stand, the decision of the Supreme Judicial Court will allow constitutional provisions to be misused as tools for the diversion of public resources that, more often than not, are rapidly shrinking.

This court has repeatedly emphasized that the Eighth Amendment simply does not apply to factual circumstances such as those in this case. *Ingraham* v. *Wright*, 430 U.S. 651, 664 (1977); *Bell* v. *Wolfish*, 441 U.S. 520, 535 (1979). As prior decisions of this court make clear, the historical background of the Eighth Amendment relates to the imposition of criminal sanctions and the desire to prevent excessive or barbarous punishments. See *Gregg* v. *Georgia*, 428 U.S. 153, 168-173 (1976) (joint opinion of Stewart, Powell and Stevens, JJ.); *Furman* v. *Georgia*, 408 U.S. 238, 316-328 (1972) (Marshall, J., concurring). Similarly, judicial interpretations of the Eighth Amendment have been concerned with criminal

punishments by limiting the kind of punishments imposed,[2] proscribing grossly excessive punishments,[3] and by placing substantive limits upon activity that may be made criminal.[4] See *Ingraham*, *supra* at 666-668 and cases cited.

Therefore, if a case falls outside of the criminal process and the imposition of criminal sanctions, the Eighth Amendment prohibition against "cruel and unusual punishments" is inapplicable. As this court stated in *Ingraham*, *supra* at 671-672, n.40:

> Eighth Amendment scrutiny is appropriate only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions. . . . [t]he State does not acquire the power to punish with which the Eighth Amendment is concerned until after it has secured formal adjudication of guilt in accordance with due process of law. Where the State seeks to impose punishment without such an adjudication, the pertinent constitutional guarantee is the Due Process Clause of the Fourteenth Amendment. (Citations omitted.)

In this case, the Eighth Amendment has no application whatsoever to one in Kivlin's situation who was injured while being apprehended by the police. See also *Bell* v. *Wolfish*, *supra* at 579 (Stevens, J. dissenting). Neither the Commonwealth nor Revere had "secured a formal adjudication of guilt" against Kivlin at the time the medical treatment was

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[2] See *Trop* v. *Dulles*, 356 U.S. 86 (1958) (expatriation for desertion); *Estelle* v. *Gamble*, *supra* (prison officials' imposing "punishment" by deliberate indifference to prisoner's serious medical needs).

[3] See *Weems* v. *United States*, 217 U.S. 349 (1910).

[4] See *Robinson* v. *California*, 370 U.S. 660 (1962).

rendered (App. 2a). Indeed, Kivlin's initial arraignment did not take place until after he was discharged from MGH (see App. 2a). Likewise, Kivlin could in no sense be considered a "prisoner." After his arraignment, he was released on his personal recognizance (see App. 2a). Even if the Commonwealth or Revere had demanded that Kivlin be held in custody pending trial, he would have been sent to the Charles Street Jail in Boston or a similar facility outside Revere, since Revere has no jails within its boundaries and maintains no detention facilities (see App. 2a, n.3). Under these circumstances, Kivlin, while protected by other constitutional guarantees, is simply not eligible to receive Eighth Amendment protection.

Even if the umbrella of Eighth Amendment protection could somehow be broadened to cover one in Kivlin's situation it still would not require Revere to pay the cost of his medical treatment. As previously stated, the Supreme Judicial Court implied a duty to pay on the part of Revere from the rule of *Estelle* v. *Gamble, supra*. Yet the extension of *Estelle's* proscription of "deliberate indifference to serious medical needs of prisoners" to requiring payment for medical treatment only applies in the context of a prison or similar jail facility. As this court stated in *Estelle, supra* at 103, "An inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met."

A criminal suspect such as Kivlin, however, is in a different position from a prisoner committed to a correctional facility. Unlike the prisoner who must rely on prison authorities to meet his needs, the suspect has not been stripped of resources, financial and otherwise, with which to pay for necessary medical treatment. To the contrary, Kivlin demonstrated the resources at his disposal by returning to MGH after his arraignment and securing additional treatment, services that the hospital voluntarily administered (see App. 8a).

Revere does not contend that its police officers could deliberately withhold or delay treatment for Kivlin after he was injured. Rather, the police acted properly and responsibly in immediately summoning an ambulance to secure necessary medical attention for Kivlin (see App. 2a). Kivlin's right to receive prompt medical treatment, however, simply cannot be equated with an obligation to pay for this treatment outside the context of a prison with inmates who "cannot by reason of the deprivation of . . . liberty, care for [themselves]." *Estelle, supra* at 104, quoting *Spicer* v. *Williamson*, 191 N.C. 487, 490, 132 S.E. 291, 293 (1926).[5]

Nor could a different result be reached under another constitutional banner. Even if this case were subjected to analysis under the Due Process Clause,[6] Revere could not be held liable to MGH. The Due Process Clause, like the Eighth Amendment, creates a limitation on the exercise of governmental power. This restraint is fundamentally different in character from a provision requiring the allotment and expenditure of public funds. As this court stated in *Harris* v. *McRae*, 448 U.S. 297, 317-318 (1980):

> [T]he liberty protected by the Due Process Clause . . . does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom. To hold otherwise would mark a drastic change in our

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[5] To equate the right to ensure prompt treatment with an obligation to pay for the treatment ultimately rendered would force municipalities to bear the cost of medical expenses in countless situations, including those in which the agents of the city or town act as good samaritans. Cf. *Dade County* v. *Hospital Affiliates International, Inc.*, 378 So.2d 43, 44 (Fla. Dist. Ct. App. 1979).

[6] The Due Process Clause of the Fourteenth Amendment provides, in pertinent part, "No State . . . shall deprive any person of life, liberty, or property, without due process of law . . ."

> understanding of the Constitution. It cannot be that because government may not prohibit the use of contraceptives, or prevent parents from sending their child to a private school, government, therefore, has an affirmative constitutional obligation to ensure that all persons have the financial resources to obtain contraceptives or send their children to private school. To translate the limitation on governmental power implicit in the Due Process Clause into an affirmative funding obligation would require Congress to subsidize the medically necessary abortion of an indigent women even if Congress had not enacted a Medicaid program to subsidize other medically necessary services. Nothing in the Due Process Clause supports such an extraordinary result.

(Citations and footnotes omitted.)[7]

Most state courts, when addressing the problem presented in this case, have resolved it by concluding that there is no municipal liability. For example, in *Trinity Hospital Association* v. *Minot*, 76 N.W.2d 916 (N.D. 1956), the Supreme Court of North Dakota, on facts virtually identical to those in this case, refused to hold the City of Minot liable. After reviewing the pertinent statutes of North Dakota, the court held that the theories of quantum meruit or implied contract could not be applied to the case. As the court stated, 76 N.W.2d at 923, "There is no basis upon which the court can construct a liability."

Similarly, the Supreme Court of Connecticut, in *Windham Community Memorial Hospital* v. *Willimantic*, 166 Conn.

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[7] See also *Maher* v. *Roe*, 432 U.S. 464, 469 (1977): "The Constitution imposes no obligation on the [government] to pay the pregnancy-related medical expenses of indigent women, or indeed to pay any of the medical expenses of indigents."

113, 348 A.2d 651 (1974), found that a municipality was not liable for the medical expenses of an injured suspect. As the *Windham* Court stated, 166 Conn. at 125-126, 348 A.2d at 658:

> In the present case, the court properly concluded that the summoning of an ambulance by the police officer did not constitute an implied promise that the resulting hospital bill will be paid by the defendant. . . . The further conclusion, properly reached, is that there was no express or implied promise by the defendant city to pay the bill. Finally, the plaintiff has failed to establish that the defendant is liable for the bill and the court was correct in rendering judgment for the defendant.

(See also *King County* v. *Seattle*, 425 P.2d 887, 890 (1967)) (Supreme Court of Washington held that a city was not liable to a county hospital for medical treatment rendered to a suspect injured by city police, since the sheriff's only duty was to deliver the injured party to the hospital for treatment).

Other state courts have ruled that the municipality must be held liable, but the basis of liability in all but one case has been statutory or common law. For example, in *Mt. Carmel Medical Center* v. *Board of County Commissioners of Labette County*, 566 P.2d 384 (Kan. 1977), the Supreme Court of Kansas held that the hospital was entitled to payment from a county based upon Kansas law. As the *Mt. Carmel* court stated, 566 P.2d at 387:

> Both parties agree that in Kansas a sheriff has a duty to furnish medical attention to a prisoner in his custody who is in need thereof, at the county's expense if the prisoner is indigent and no other source of funds is available. This is clearly the law in Kansas.

(See also *Spicer* v. *Williamson*, 191 N.C. 487, 132 S.E. 291 (1926)).

Elsewhere, decisions have been predicated on statutory enactments. Thus, in *City of Tulsa* v. *Sisler*, 285 P.2d 422 (Okla. 1955), municipal liability was based on a statute that expressly required officials to tend to the medical needs of prisoners in custody. See also *Lamar* v. *Board of Comm'rs of Pike County*, 4 Ind. App. 191, 30 N.E. 912 (1892).[8]

Only one other state, Nebraska, has created municipal liability based upon an Eighth Amendment duty. In *Lutheran Medical Center of Omaha* v. *Omaha*, 204 Neb. 292, 281 N.W.2d 786 (1979), the Supreme Court of Nebraska held that the City of Omaha was liable for the cost of medical services provided to both a prisoner in the city jail and a criminal suspect not yet incarcerated. *Lutheran Medical Center*, however, is distinguishable from this case since the City of Omaha operated its own jail facility and the litigants stipulated to the criminal suspect's status as a prisoner in the custody of city police. Even if *Lutheran Medical Center* is not distinguished by reason of the stipulation, it remains, along with the opinion of the Supreme Judicial Court in this case, isolated from the vast majority of decisional law in this area.

Not only is the Supreme Judicial Court's decision a distortion of the Eighth Amendment and in conflict with decisions of courts of last resort in other jurisdictions, but also is a contrived and unnecessary effort, in effect, to legislate results deemed to be in the public interest. The Supreme Judicial Court's opinion in this case was presumably motivated by the laudable intention to secure emergency medical treatment for

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[8]Statutes in other states have provided for emergency treatment without imposing liability on municipalities. For example, in Florida, Fla. Stat. § 401.45 (1977), requires all licensed hospitals to provide emergency treatment to all persons requiring it. Cf. *Dade County* v. *Hospital Affiliates International, Inc.*, *supra* at 46, n.5.

injured persons. As the Court stated, 385 Mass. at 779, 434 N.E.2d at 189, App. 8a, "To ensure Kivlin's right to medical care, Revere must be held liable to the hospital for the medical services it rendered." (See also App. 8a n.10.)

Yet the court's effort, tantamount to legislating social policy, was entirely unnecessary. Through a series of existing legislative enactments, an injured suspect in Massachusetts, like other emergency patients, must be given life-saving medical treatment regardless of financial ability to pay. For example, under Massachusetts law, a patient has the right to receive prompt emergency life-saving treatment without regard to financial status. See Mass. Gen. Laws Ann. c. 111, § 70E K (West 1982). This right is enforceable by the patient through a civil action for malpractice. See Mass. Gen. Laws Ann. c. 111, § 70E (West 1982) and Mass. Gen. Laws Ann. c. 231, § 60B *et seq.* (West 1982).

In addition, a variety of legislative enactments provide for public funding to hospitals to meet the costs of emergency treatment. On the state level, numerous public welfare programs mandate financial assistance to needy persons who require medical care. See Mass. Gen. Laws Ann. c. 118E (West 1982). Similarly, federal programs, such as the Hospital Survey and Construction Act, commonly known as the Hill-Burton Act, provide funding for hospitals such as MGH to ensure medical treatment for indigents. See 42 U.S.C. § 291 et seq.; cf. *Falmouth Hospital* v. *Lopes*, 376 Mass. 580, 382 N.E.2d 1042 (1978).

The Supreme Judicial Court's construction of the Eighth Amendment requires that the Constitution displace these other applicable legislative enactments. In this era of increasing demands for governmental service and shrinking public resources,[9] the allocation of funding ought to be a legislative,

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[9] In November, 1980, Massachusetts voters adopted, under the initiative process of the Massachusetts Constitution, Chapter 580 of the Acts of 1980,

not a judicial function. It seems plain that no judicial intrusion such as that of the Supreme Judicial Court in the instant case can be defended as an appropriate interpretation of the Eighth Amendment.

Conclusion.

The opinion of the Supreme Judicial Court grafted onto the Eighth Amendment limitation on the exercise of the government's power to punish, an affirmative funding obligation on the part of local government. This result conflicts with decisions in other states and distorts the purpose and function of the Eighth Amendment as enunciated in the opinions of this court. If permitted to stand, the Supreme Judicial Court's opinion will increase pressures to create entitlements to public funds resting on the Eighth Amendment and other constitutional provisions. To make clear that the Eighth Amendment permits no such result, this court should grant certiorari to review the decision of the Supreme Judicial Court of the Commonwealth of Massachusetts.

Respectfully submitted,

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entitled "An Act Limiting State and Local Taxation and Expenditures," popularly known as Proposition 2½. Proposition 2½ sets strict limits on the power of municipalities to levy taxes and spend the revenues collected. Cf. *Massachusetts Teachers Association* v. *Secretary of the Commonwealth*, Mass. Adv. Sh. (1981) 1764, 424 N.E. 2d 469.